Mirza Mohamed Tariq Beg bin Mirza HH Beg v Margaret Low Saw Lui & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–(IM)–218 OF 2009
RAUS SHARIF, GOPAL SRI RAM AND HASAN LAH JJCA
11 MAY 2009

Legal Profession — Disqualification — Conflict of interest — Whether trial judge erred in granting application to disqualify solicitor from acting for plaintiff — Whether solicitor privy to confidential information — Whether potential witness rule had any application in present case — Legal Profession (Practice and Etiquette) Rules 1978 r 3

The plaintiff and the first to sixth defendants were directors and shareholders of the seventh defendant company ('the company'). On 9 March 2008, a meeting ('the meeting') was convened to advise the company and its board of directors about an investigation mounted against the company by the Anti-Corruption Agency. Miss Renu Zechariah ('MRZ') and one Ragumaran, both advocates and solicitors, attended this meeting and the latter recorded the minutes of that meeting. Subsequently, the plaintiff represented by MRZ filed a civil suit against the defendants when a shareholder's dispute arose between them. The second and third defendants applied to disqualify MRZ from acting for the plaintiff in the civil suit on the grounds that as MRZ had formerly acted for the company it would be a conflict of interest for her to now act for the plaintiff against the company. The High Court granted the application to disqualify MRZ. It found that since MRZ had attended the meeting she was privy to the confidential information that was disclosed at the meeting and therefore there was a potential conflict of interest if she were to represent the plaintiff in the civil suit. Being dissatisfied with this decision the plaintiff had appealed and at the same time filed a notice of motion to stay the High Court's order. MRZ submitted that the High Court judge had failed to appreciate and apply the known principle of law with regard to disqualification of counsel and that the potential witness rule was a non-issue and had no application at the present stage of the proceeding. The second and third defendants maintained that the confidential information that MRZ was privy to amounted to privileged communication which could not be disclosed without the consent of the provider of the information. They further submitted that by being in possession of such information MRZ would be put in a potentially embarrassing situation as envisaged under r 3 of the Legal Profession (Practice

and Etiquette) Rules 1978 and therefore ought to be disqualified from representing the plaintiff either directly or indirectly.

Held, allowing the appeal with costs:

(1) In order for the principle of confidentiality to apply warranting a court to intervene, there must first be established a relationship of solicitor and client or some other fiduciary relationship. However in the present case there was no evidence by any party that MRZ had acted for the company. The only evidence put forward was the single attendance of MRZ at the meeting on 9 May 2008 but the minutes of that meeting showed that Ragumaran was the company's solicitor and MRZ herself gave evidence that she was acting for the plaintiff when she attended the meeting. Accordingly, the relationship of solicitor and client or other fiduciary relationship was absent in this case (see paras 16–17).

(2) Further, to bar a solicitor from acting, the applicant must place before the court full particulars of the relevant confidential information that was allegedly disclosed to the solicitor. In the instant case, the only evidence to support disqualifying MRZ from acting for the plaintiff in the civil suit was the minutes that was recorded by Ragumaran and which was available to all members of the company including the plaintiff. As such, even if MRZ was not present at the meeting, there was nothing to prevent the plaintiff from revealing the contents of the minutes to MRZ to enable the latter to prepare the plaintiff's case. As such, the principle of breach of confidential information had no application to the facts of this case (see paras 18–19).

(3) The issue of MRZ being a potential witness to the civil suit was a non-issue since none of the defendants raised it as an issue in their application to disqualify MRZ. In any case since MRZ had no real involvement in the content of the minutes recorded by Ragumaran there was nothing useful that she could add to the minutes if she should be called as a witness (see paras 22–23).

(4) A strong case must be made out to prevent a solicitor from acting on a particular case on the grounds of conflict of interest. The onus of proof lies on the party alleging the conflict, ie, the second and third defendants and in this case they had not discharged this onus (see para 24).

[Bahasa Malaysia summary

Plaintif dan defendan pertama hingga keenam merupakan pengarah-pengarah dan pemegang-pemegang saham syarikat defendan

ketujuh ('syarikat'). Pada 9 Mac 2008, satu mesyuarat ('mesyuarat') telah diadakan untuk menasihatkan syarikat dan lembaga pengarah mengenai penyiasatan yang dijalankan ke atas syarikat oleh Badan Pencegah Rasuah. Cik Renu Zechariah ('CRZ') dan Ragumaran, kedua-duanya peguamcara dan peguambela, menghadiri mesyuarat ini dan Ragumaran merekodkan minit mesyuarat tersebut. Selepas itu, plaintif diwakili oleh CRZ memfailkan satu guaman sivil terhadap defendan-defendan apabila pertikaian pemegang saham timbul antara mereka. Defendan kedua dan ketiga memohon untuk menyingkirkan CRZ daripada bertindak bagi pihak plaintif dalam guaman sivil atas alasan bahawa CRZ sebelumnya pernah bertindak bagi pihak syarikat maka terdapat konflik kepentingan bagi dia untuk bertindak bagi pihak plaintif terhadap syarikat. Mahkamah Tinggi membenarkan permohonan untuk menyingkirkan CRZ. Dinyatakan bahawa sejak CRZ menghadiri mesyuarat tersebut dia adalah privi kepada maklumat sulit yang didedahkan dalam mesyuarat tersebut dan oleh itu terdapat potensi konflik kepentingan sekiranya dia mewakili plaintif dalam guaman sivil. Plaintif yang tidak berpuas hati dengan keputusan tersebut telah merayu dan pada masa yang sama memfailkan notis usul untuk mengekalkan perintah Mahkamah Tinggi. CRZ mengemukakan bahawa hakim Mahkamah Tinggi telah gagal untuk menghargai dan memakai prinsip undang-undang yang diketahui berkenaan penyingkiran peguam dan bahawa prinsip saksi berpotensi bukan satu isu dan tidak dipakai pada peringkat prosiding sekarang. Defendan kedua dan ketiga menegaskan bahawa maklumat sulit yang CRZ menjadi privi terhadapnya merupakan komunikasi sulit yang tidak dapat didedahkan tanpa persetujuan pemberi maklumat berkenaan. Mereka selanjutnya menghujah bahawa dengan memiliki maklumat berkenaan CRZ akan diletakkan dalam keadaan kecewa seperti yang dinyatakan di bawah k 3 Kaedah-Kaedah Profesion Undang-Undang (Amalan dan Kesopanan) 1978 dan oleh itu sepatutnya disingkirkan daripada mewakili plaintif sama ada secara langsung atau tidak.

Diputuskan, membenarkan rayuan dengan kos:

(1) Untuk memakai prinsip kerahsiaan yang mewajarkan mahkamah untuk mencelah, pertamanya mesti dibuktikan terdapat hubungan peguamcara dan klien atau hubungan fidusiari yang lain. Walau bagaimanapun dalam kes ini tiada bukti oleh mana-mana pihak bahawa CRZ telah bertindak bagi pihak syarikat. Satu-satunya bukti yang dikemukakan adalah satu kehadiran CRZ pada mesyuarat pada 9 Mei 2008 tetapi minit mesyurat tersebut menunjukkan bahawa Ragumaran adalah peguamcara syarikat tersebut dan CRZ sendiri memberikan keterangan bahawa dia bertindak bagi pihak plaintif apabila dia

menghadiri mesyuarat tersebut. Oleh itu, hubungan peguamcara dan klien atau hubungan fidusiari yang lain tiada dalam kes ini (lihat perenggan 16–17).

(2) Tambahan pula, untuk menghalang seorang peguam daripada bertindak, pemohon mesti memberikan maklumat sulit yang dikatakan telah didedahkan kepada peguam berkenaan kepada mahkamah. Dalam kes ini, satu-satunya bukti untuk menyokong penyingkiran CRZ daripada bertindak bagi pihak plaintif dalam guaman sivil adalah minit yang direkodkan oleh Ragumaran dan disediakan kepada semua ahli syarikat termasuk plaintif. Oleh itu, walaupun sekiranya CRZ hadir pada mesyuarat berkenaan maka tiada apa yang dapat menghalang plaintif daripada mendedahkan isi kandungannya kepada CRZ untuk membolehkan CRZ kemudiannya bersedia bagi kes plaintif. Oleh yang demikian, prinsip pelanggaran maklumat sulit tidak boleh dipakai pada fakta-fakta kes ini (lihat perenggan 18–19).

(3) Isu CRZ menjadi saksi berpotensi kepada sivil guaman bukanlah satu isu memandangkan tiada seorang pun daripada defendan-defendan menimbulkannya sebagai isu dalam permohonan mereka untuk menyingkirkan CRZ. Dalam kes ini memandangkan CRZ tidak terbabit dalam isi kandungan minit yang direkodkan oleh Ragumaran maka tiada apa yang berguna dapat ditambah olehnya kepada minit sekiranya dia dipanggil sebagai saksi (lihat perenggan 22–23).

(4) Kes yang kukuh mesti dibuat bagi menghalang seseorang peguam daripada bertindak pada kes tertentu atas alasan konflik kepentingan. Beban membuktikan terletak pada pihak yang mengatakan konflik, iaitu defendan kedua dan ketiga dan dalam kes ini mereka tidak menyingkirkan beban tersebut (lihat perenggan 24).]

Notes

For a case on conflict of interest, see 9 *Mallal's Digest* (4th Ed, 2005 Reissue) para 1573.

Cases referred to

Hardless v Hardless AIR 1932 Allahabad 536 (folld)

Prince Jefri Bolkiah v KPMG (a firm) [1990] 2 AC 222, HL (not folld)

Wee Choo Keong v Public Prosecutor [1990] 2 MLJ 239; [1990] 3 CLJ 346, HC (folld)

Legislation referred to

Legal Profession (Practice and Etiquette) Rules 1978 rr 3, 28

Appeal from: Suit No D4–22–1417 of 2008 (High Court, Kuala Lumpur).

Harpal Singh Grewal (Renu Zechariah with him) (Rosley Zechariah) for the appellant.
Ng Sai Yeang (Raja Darryl & Loh) for the first, fourth, fifth and sixth respondents.
Alan Wong (Hendrew Heng with him) (Zain Megat & Murad) for the second and third respondents.
M Reza Hassan (Raja Riza & Associates) for the seventh respondent.

Raus Sharif JCA:

[1] On 13 February 2009, the Kuala Lumpur High Court granted the second and third defendants' application to disqualify Miss Renu Zechariah ('MRZ') from acting for the plaintiff directly or indirectly in the High Court Suit No D4–22–1417 of 2008 ('the D4 Suit'). Being dissatisfied, the plaintiff had appealed against the High Court decision. At the same time, the plaintiff had also filed a notice of motion to stay the High Court's order.

[2] The notice of motion dated 18 February 2009 was fixed before us on 23 February 2009. With the agreement of the parties, the notice of motion was treated as the appeal proper.

[3] Having heard arguments of the parties, the matter was adjourned for our consideration and decision. I now give my decision and the reasons for the same.

[4] What happened in this case is this. On 9 March 2008, MRZ and one Mr Ragumaran, both advocates and solicitors, attended a meeting of a company called Perunding Pakarmedia Sdn Bhd ('the company'). The company is the seventh defendant. The plaintiff and the first to sixth defendants are directors and shareholders of the company.

[5] The meeting on 9 March 2008 was convened for the purpose of advising the company and its board of directors in relation to an Anti-Corruption Agency's ('ACA') investigation against the company.

[6] At the meeting, each director narrated what he or she had said to the ACA. The narration was reduced into writing by Mr Ragumaran in a form of minutes of meeting.

[7] Subsequently, MRZ, through her firm, Messrs Rosley Zechariah, appeared on record for the plaintiff in the D4 suit against the defendants. The case is essentially a shareholders' dispute.

[8] On 12 December 2008, the second and third defendants filed the application to disqualify MRZ. The application was filed after several applications had come up for hearing, disposed of, orders made thereon, with the defendants being present through their respective counsel at all times.

[9] The application to disqualify MRZ was grounded on conflict of interest as it was alleged that MRZ had acted for the company previously and was now acting for the plaintiff against the company.

[10] The learned High Court judge held that there is a potential conflict of interest if MRZ was to continue to represent the plaintiff in the D4 suit as MRZ who attended the meeting would be privy to the confidential information disclosed at the meeting. She also noted that the draft minutes of the meeting was seriously disputed by the parties, and in view of MRZ's presence at the meeting, MRZ is a potential witness and should not appear as counsel in the D4 suit.

[11] Before us, the complaint by Mr Harpal Singh, learned counsel for MRZ are two fold. First, the learned High Court judge failed to appreciate and apply the known principle of law with regard to disqualification of counsel. Secondly, the potential witness rule is a non-issue and has no application at the present stage of the proceeding.

[12] Mr Alan Wong, learned counsel for the second and third defendants submission is premised on the grounds of conflict of interest and/or breach of confidence. It may be summarised as follows. MRZ and Mr Ragumaran were appointed as solicitors by the company to render legal advice to the company and its directors in relation to ACA investigation which involved the company. Both attended the meeting of the company on 9 May 2008, wherein various confidential information was disclosed to both solicitors through the second and third defendants in relation to ACA investigation.

[13] Mr Alan Wong contended that the confidential information amounts to privileged communication and is protected under the law wherein it cannot be disclosed unless with the consent of the provider of the information. Thus, MRZ continued involvement in the D4 suit raises a position of conflict of interest as MRZ had been previously appointed by the company.

[14] Mr Alan Wong further submitted that the continued involvement of MRZ in the D4 suit would disseminate confidential information obtained in MRZ capacity as the company's solicitor at the 9 May 2008 meeting. Arising thereof, MRZ was embarrassed and ought to be disqualified from representing the plaintiff either directly or indirectly. This, he argued, is in

line with r 3 of the Legal Profession (Practice and Etiquette) Rules 1978 ('Practice and Etiquette Rules') which provides:

> 3 (a) Advocate and solicitor should not to accept a brief if he is or would be embarrassed.
>
> (b) An embarrassment arises —
>
> (i) where the advocate and solicitor finds he is in possession of confidential information as a result of having previously advised another person in regard to the same matter;
>
> (ii) where there is some personal relationship between him and a party or a witness in the proceedings.

[15] In support, Mr Alan Wong referred to the case of *Prince Jefri Bolkiah v KPMG (a firm)* [1990] 2 AC 222, where Lord Millett said:

> In *Rakusen*'s case (*Rakusen v Ellis, Munday & Clarke* [1912] 1 Ch 831) the Court of Appeal founded the jurisdiction on the right of the former client to the protection of his confidential information. This was challenged by counsel for Prince Jefri, who contended for an absolute rule, such as that adopted in the United States, which precludes a solicitor or his firm altogether from acting for a client with an interest adverse to that of the former client in the same or a connected matter. In the course of argument, however, he modified his position, accepting that there was no ground on which the court could properly intervene unless two conditions were satisfied:
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> (i) that the solicitor was in possession of information which was confidential to the former client and
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> (ii) that such information was or might be relevant to the matter on which he was instructed by the second client. This makes the possession of relevant confidential information the test of what is comprehended within the expression 'the same or a connected matter.' On this footing the court's intervention is founded not on the avoidance of any perception of possible impropriety but on the protection of confidential information.
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> My Lords, I would affirm this as the basis of the court's jurisdiction to intervene on behalf of a former client. It is otherwise where the court's intervention is sought by an existing client, for a fiduciary cannot act at the same time both for and against the same client, and his firm is in no better position. A man cannot without the consent of both clients act for one client while his partner is acting for another in the opposite interest. His disqualification has nothing to do with the confidentiality of client information. It is based on the inescapable conflict of interest which is inherent in the situation.

...

Where the court's intervention is sought by a former client, however, the position is entirely different. The court's jurisdiction cannot be based on any conflict of interest, real or perceived, for there is none. The fiduciary relationship which subsists between solicitor and client comes to an end with the termination of the retainer. Thereafter the solicitor has no obligation to defend and advance the interests of his former client. The only duty to the former client which survives the termination of the client relationship is a continuing duty to preserve the confidentiality of information imparted during its subsistence.

Accordingly, it is incumbent on a plaintiff who seeks to restrain his former solicitor from acting in a matter for another client to establish

(i) that the solicitor is in possession of information which is confidential to him and to the disclosure of which he has not consented and

(ii) that the information is or may be relevant to the new matter in which the interest of the other client is or may be adverse to his own. Although the burden of proof is on the plaintiff, it is not a heavy one. The former may readily be inferred; the latter will often be obvious. I do not think that it is necessary to introduce any presumptions, rebuttable or otherwise, in relation to these two matters. But given the basis on which the jurisdiction is exercised, there is no cause to impute or attribute the knowledge of one partner to his fellow partners. Whether a particular individual is in possession of confidential information is a question of fact which must be proved or inferred from the circumstances of the case. In this respect also we ought not in my opinion to follow the jurisprudence of the United States.

...

It is in any case difficult to discern any justification in principle for a rule which exposes a former client without his consent to any avoidable risk, however slight, that information which he has imparted in confidence in the course of a fiduciary relationship may come into the possession of a third party and be used to his disadvantage. Where in addition the information in question is not only confidential but also privileged, the case for a strict approach is unanswerable. Anything less fails to give effect to the policy on which legal professional privilege is based. It is of overriding importance for the proper administration of justice that a client should be able to have complete confidence that what he tells his lawyer will remain secret. This is a matter of perception as well as substance. It is of the highest importance to the administration of justice that a solicitor or other person in possession of confidential and privileged information should not act in any way that might appear to put that information at risk of coming into the hands of someone with an adverse interest.

[16] I accept the above principles of law. Two important propositions emerge. First, for the principle of confidentiality to apply warranting a court to intervene, there must first be established a relationship of solicitor and client or some other fiduciary relationship. In the absence of such a relationship, the principle does not apply. The facts of *Hardless v Hardless* AIR 1932 Allahabad 536 provide a good example as to how the principle is to be applied. In that case, the respondent to a divorce petition wrote to a counsel referring to complaints that he had against his wife and stating that he desired to take action so that he might obtain custody of the children. However, the letter did not definitely engage counsel's services. Later, the said counsel was engaged by the petitioner to act for her and the respondent husband made application to prohibit him from acting in the matter. The court dismissed the application and held as follows:

> A great ideal has to take place before counsel can be said to be engaged by a party to a suit, so that it would be unprofessional for him to appear on the other side. In order to prevent counsel appearing for the other party, he must have a definite retainer with a fee paid or he must have had such confidential information from one of the parties as would make it improper for him to appear for the other party. Nothing of this sort has occurred here. There is nothing of a confidential nature in the letter of 24 December which would prejudice the respondent if Capt Carleton appears for the petitioner. If this sort of letter acted as a bar to counsel appearing for the opposite party, nothing would be simpler for a prospective litigant than to write to all the leading counsel in the court a letter such as this. He need not have the slightest intention of engaging any of them. The petition is rejected.

Second, it depends on the facts of each case whether confidential information was conveyed. In order to bar a solicitor or other fiduciary from acting, the applicant must place before the court full particulars of the relevant confidential information that was allegedly disclosed to the solicitor or fiduciary. Mere general or vague allegations are insufficient. As was stated in *State v Lalit Mohan Nanda* AIR 1961 Orissa 1:

> … the onus of proving that confidential information was conveyed lies heavily upon the applicant.

[17] Applying the above principles to the facts of the present case, the first observation that I would make is that there is no evidence by any party that MRZ had acted for the company. The only evidence put forward was the single attendance of MRZ at the meeting on 9 May 2008. The defendants' evidence was that they 'understood' or 'believed' that MRZ was representing the company at the meeting. But the minutes of the meeting does not support what they 'understood' or 'believed'. The minutes shows that Mr Ragumaran was the company's solicitors. Against such evidence, we have the evidence of the plaintiff and MRZ who denied on oath that MRZ had ever acted for the company. According to MRZ, she was acting for the plaintiff

when she attended the meeting on 9 May 2008. Hence, the allegation of MRZ was acting for the company should have been rejected. Accordingly, the relationship of solicitor and client or other fiduciary relationship is absent in this case.

[18] Second, the only evidence in support to disqualify MRZ from acting for the plaintiff in D4 suit is the minutes. My respectful view is that there is nothing confidential about the minutes. The minutes which were recorded by Mr Ragumaran basically contained of what each of the directors of the company had said to the ACA. Hence, the minutes are available to all members including the plaintiff. Surely, the plaintiff must be at liberty to use the minutes. Even if MRZ was not present at the meeting, there is nothing to stop the plaintiff from revealing the content of the minutes to MRZ for the purpose of MRZ preparing the plaintiff's case against the defendants.

[19] Consequently, it is my respectful view that the principle of breach of confidential information as espounded by the House of Lords in *Prince Jeffri Bolkiah* has no application to the facts of this case.

[20] On the issue of MRZ being a potential witness to the D4 suit, it must have to do with r 28 of the Practice and Etiquette Rules which provides:

(a) An advocate and solicitor shall not appears in court or in chambers in any case in which he has reason to believe that he will be a witness in respect of a material and disputed question of fact, and if while appearing in a case it become apparent that he will be such a witness, he shall not continue to appear if he can retire without jeopardising his client's interest.

[21] Wan Yahaya J (as he then was) in the case of *Wee Choo Keong v Public Prosecutor* [1990] 3 CLJ 346 in interpreting r 28 of the Practice and Etiquette Rules held that the court should not apply the Rules with the stringency of force of law but rather should instead utilise the rule of common sense and fair play in keeping with the tradition of maintaining a fair and impartial adversarial system.

[22] I whole heartedly agree with the observation by learned and well respected judge. In the present case, the potential witness rule can only arise in respect of the minutes. But, MRZ has no real involvement in the content of the minutes. It was recorded by Mr Ragumaran. Hence, there is nothing useful that MRZ could add on to the minutes should she be called as a witness.

A **[23]** Moreover, the issue of MRZ being a potential witness is a non-issue. In fact none of the defendants raised the issue in their application to disqualify MRZ. Hence, arguments were not canvassed and authorities not referred by either party to the learned High Court judge on this issue. Thus, it should not be a ground to disqualify MRZ for acting for the plaintiff.

B

[24] In conclusion, I am of the view that a strong case must be made out before preventing counsel from acting in a particular case on the ground of conflict of interest. The onus of proof lies on the party alleging the conflict. In this case, I find that the onus has not been discharged by the second and third defendants. There is insufficient evidence to justify denying MRZ the right to represent the plaintiff at this stage of the proceeding.

C

[25] For the above said reasons, the appeal must be allowed with costs here and below. The deposit to be refunded to the plaintiff.

D

[26] My learned brothers Gopal Sri Ram JCA (now FCJ) and Hasan bin Lah JCA have read this judgment in draft and have expressed their agreement to make it the judgment of the court.

E

Appeal allowed with costs.

Reported by K Nesan

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